IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1921.

No. 224.

INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA and O. J. BURTON,

Petitioners,

vs.

JOHN BARTON PAYNE, as Agent under Section 206, Transportation Act, 1920 (Los Angeles and Salt Lake Railway Company),

Respondent.

PETITIONERS' REPLY BRIEF.

This reply brief will be limited to the points raised in respondent's brief. Arguments made by us in our opening brief and not directly challenged in respondent's brief, will not be repeated. In this reply we will state the exact points upon which respondent's brief takes issue with ours, briefly recapitulate our position with respect to the issues raised by respondent, and answer briefly a few matters raised in respondent's brief.

I.

THE POINTS OF DIFFERENCE BETWEEN PETITIONERS' AND RESPONDENT'S BRIEF.

A. In our opening brief we made the contention, among others, that the decisions of this court in the *Winters* and other cases cited in our opening brief, pp. 17–25, require the holding that engines, cars and other ambulatory instrumentalities of commerce of a railroad are engaged in interstate commerce only when in use in such commerce, and not while removed from service for repairs, and that the character of previous or subsequent service of such engine or car is immaterial in determining jurisdiction over injuries occurring in the course of making such repairs.

B. At the least, respondent's brief concedes these decisions to establish the rule that where such locomotive or car is used in mixed interstate and intrastate commerce while in service, injuries sustained by workmen in repairing them while withdrawn from service are not within the federal act.

C. Respondent seeks to distinguish the present case from this conceded rule, by claiming that the locomotive here involved was not used in both commerces, or indiscriminately in interstate and intrastate commerce, but was instead used exclusively in interstate commerce prior to being shopped for repairs, and therefore such engine should be governed by the rules heretofore laid down by this court for repairs of track, roadbed and bridges, and

not by the rules made applicable by this court to rolling stock in the cited cases.

D. The exact point of difference raised by respondent's brief is therefore whether the nature of the use of the locomotive here involved before and after its withdrawal from service for repairs, is sufficient to differentiate it from the decisions of this court cited and whether the true test of jurisdiction is the character of the past or future service of the engine undergoing repair, or the relation of the engine to commerce at the time of the repair, i. e., whether in service in commerce or not at said time.

II.

RECAPITULATION OF PETITIONERS' CONTENTIONS ON THIS POINT.

A. The Locomotive in the Present Case Was Not in Fact Used Exclusively in Interstate Commerce Prior to Its Being Shopped. It Moved Some Local Commerce as Well as Interstate During the Period in Question.

The most that appears is that for the five months before the locomotive was shopped the proportion of interstate to intrastate work had run very high. The use of the engine prior to said period of five months is unknown. It is conceded that the engine was physically susceptible of such use as the railroad might require of it at any time, interstate, intrastate or mixed. It had merely been on a run almost

wholly interstate for some months, to return prima facie to such run on the conclusion of repairs, but always subject to diversion as the exigencies of the road might require. It was not therefore *permanently* devoted to interstate commerce.

Moreover, during the five months in question it handled some intrastate commerce (as we pointed out in our opening brief, pp. 31–2, to which we refer the court), so that the difference is of degree only, the percentage of interstate commerce being higher than in most of the cases cited, but not total.

In *Chicago, R. I. & P. R. Co.* vs. *Cronin*, ——— Okla. ———, 175 Pac. 919 (quoted at p. 23 of our opening brief), the percentage of interstate commerce hauled by the engine while in service was as great as in the present case. In other cases cited in our brief the percentage of interstate commerce handled by the locomotive was more than half and closely approaches that of the present case.

The present case is therefore not distinguishable upon its facts from the cases cited by us.

B. The Rule Is the Same Even if the Engine Is Engaged Largely, Substantially Wholly, or Wholly in Interstate Commerce at the Time It Is Taken Out of Service. The Test Is Whether the Engine Is in Use in Interstate Commerce at the Time of the Injury or Withdrawn from Service in Any or All Commerce.

Our contention (opening brief, pp. 17–25) is that the cases cited turn upon the relation of the engine

to imterstate commerce while undergoing repairs, not tthe character of past or future service. Where an engine is wholly withdrawn from service for repaiirs it is not during the period of repair an instrrumentality of any kind of commerce.

The court is referred to our opening brief (pp. 11–25) for our argument upon the contention here stated.

Engines and cars are in interstate commerce only when in actual use in such commerce. We refer the court to our brief, pp. 27–29.

We would further point out that the test usually applied by this court of the interstate character of an instrumentality, is not whether *all* the work is interstate, but whether *any* is interstate. (*Pedersen vs. D. L. & W. Ry. Co.*, 229 U. S. 146, 152.) Tracks and roadbed are instrumentalities of interstate commerce if one shipment a day or one shipment a week of interstate commerce passes over them, and are not made any more so if the greater part or all of the commerce moving over them is interstate. A train is an interstate train if there is a single interstate shipment on it, and is not made any more interstate in character if the greater part or all of the commerce borne by it is interstate. Hence in the present case, if the engine in question moved *any* interstate commerce while in service, such fact is as sufficient to determine its character as if all of its work was interstate. Since respondent concedes that the federal act is inapplicable to the repair

of engines employed in mixed service, it follows that the result should be the same here. An engine is no more interstate in character where used exclusively in interstate commerce than when used in mixed service.

Fundamentally it should be borne in mind that the Federal Employers' Liability Act rests upon the constitutional power of Congress to regulate interstate and foreign commerce. The act can neither be construed to extend beyond the *regulation of interstate and foreign commerce,* nor can Congress constitutionally give to the act such effect. The regulation of the relation of employer and employee in railroad repair shops is no part of the regulation of interstate and foreign commerce. The repair of engines and cars is not commerce at all. It is so held expressly in

The First Employers' Liability Cases, 207 U. S. 463, at page 498.

III.

COMMENTS ON SPECIFIC STATEMENTS IN RESPONDENT'S BRIEF.

Answering respondent's brief (pp. 14–15), the claim is there made in general language that since engines and cars are necessary to move interstate commerce and since they require repairing, such repairs must necessarily be a part of the interstate commerce business of the railroad. The *Pedersen* case (*Pedersen* vs. *D. L. & W. R. R. Co.*, 229 U. S.

146) is cited in this connection. If the *Pedersen* case were intended to so hold, it has clearly been modified by this court in the *Winters* and other later cases cited by us, which differentiate engines and cars from roadbed and bridges for repair purposes. It was not so intended, however, as is shown by the following excerpt from the opinion in that case, which warrants the proposition that an instrumentality of commerce, even a track or bridge, is not within the federal act if wholly and definitely taken out of use and service during the making of alterations or repairs:

> "Of course, we are not here concerned with the construction of tracks, bridges, engines or cars which have not as yet become instrumentalities in such commerce, but only with the work of maintaining them in proper condition after they have become such instrumentalities and *during their use as such.*" (Italics ours.) *Pedersen* vs. *D. L. & W. R. R. Co.*, 229 U. S. 146, 152.

Referring to respondent's discussion of the *Winters* case (respondent's brief, pp. 17–21), we frankly concede that the language used by the court in that case is capable of a double construction. The portion of the opinion italicized in our opening brief (pp. 18–19) supports our position. Other portions of the opinion, italicized by respondent (respondent's brief, p. 18) tend to support respondent's position. We ask the court to clarify its holding in that case so that it can no longer be cited

upon both sides of the present question. We believe the true construction of the case, as indicated by the opinion as a whole, and by the tendency of the court disclosed in its later decisions cited on pages 17–18 of our opening brief, to be that the repair of an ambulatory instrumentality of railroad operation is within the federal act only where the object is engaged in interstate commerce at the time of the repair, such as "where it is interrupted in the course of an interstate haul, to go on." (*Winters* case.)

Referring to the cases cited by respondent's brief (pp. 21–22), respondent has overlooked a distinction drawn by this court between services supplying current needs of locomotives *in use*, and the repairing or overhauling of such engines while *out of use*. Acts of coaling, watering, lubricating, sanding, etc., of engines, either while such engines are on interstate runs or while they are being groomed at night between such runs, may be conceded to be services in interstate commerce, as they are all services in "keeping in usable condition" instrumentalities then in active use in interstate commerce. Acts of repair to ambulatory instrumentalities at the time withdrawn from all commerce, are very different. This distinction was pointed out by us on page 23 of our brief in quoting from *Lindway* vs. *Penn Co.*, ——— Penn. ———, 112 Atl. 40, in which the Supreme Court of Pennsylvania made the same differentiation.

This explanation also covers respondent's citation of *Erie R. R. Co.* vs. *Szary*, 253 U. S. 86 (respondent's brief, p. 29), the service of sanding engines while in use falling into the same class as coaling, watering, etc. All these are services intimately connected with train movements, not with repairs.

Referring to respondent's discussion of the *Branson* case (respondent's brief, pp. 24–5), respondent comments upon the lack of information concerning the proportion of interstate and local work of the engines and cars while in service. We think the absence of such information in the reports strongly corroborates our position. That case arose upon demurrer to the plaintiff's declaration, the declaration stating merely that the engines and cars were used in the interstate commerce business of the railroad and not disclosing any intrastate use. Upon such demurrer the court below and this court were entitled to assume, and probably did assume, that the case was the same as if such engines and cars were used *wholly* in interstate commerce. The absence of any intimation that exclusive use in interstate commerce would have altered the decision, indicates that such exclusive use, for the purpose of ruling upon the demurrer, would not have made any difference.

Referring to respondent's brief, page 31, in which our argument is commented upon that "no interstate commerce was then waiting upon Burton's action for forwarding," respondent endeavors to show that this test is overruled by the *Pedersen*

case, there cited. In the *Pedersen* case, however, the bridge under repair *was in service* at the time the repairs were being made, and hence the making of repairs was a "present assistance" to interstate commerce then moving across it. If the repairs were not made, interstate commerce would soon cease to cross the bridge. Pedersen's act in carrying bolts was expressly held by this court to be incidental to and a part of the general service of repairing the bridge. In the present case, no interstate commerce business was being done by the locomotive while undergoing repairs. Neither would any subsequent deterioration of the locomotive while in the repair shop stop the movement of any interstate commerce.

Similarly, respondent's attempted distinction (respondent's brief, pp. 34–5) of *Wright* vs. *Interurban Railway Company*, 179 N. W. 877, *certiorari* denied 41 Sup. Ct. Rep. 375, is ineffectual. Although the proportion of interstate commerce carried by the railroad in that case was small, the railroad *was undoubtedly an interstate road* and any cessation of electric power would cause all interstate business of the road to immediately cease. The power station was the equivalent of a locomotive, as it was the instrumentality by which commerce was moved. If the substation had been in service at the time of the alterations, the injury would have come under the federal act (*Southern Pac. Co.* vs. *Industrial Accident Commission*, 251 U. S. 259). The

repair of the power station was held, however, not to be within the federal act because the instrumentality was out of service at the time. Hence the case substantiates our claim that the test is whether the instrumentality is in service or out of service at the time of the repairs.

IV.

NEW CITATIONS.

The following state court decisions reported since the preparation of our opening brief, further support our claim that the test of jurisdiction in repair cases is whether the instrumentality undergoing repair is in service in interstate commerce at the time of the repairs or not.

L. & N. R. Co. vs. *Pettis*, 89 So. 201;
Payne vs. *Wynne* (Tex.), 233 S. W. 609.

Respectfully submitted.

WARREN H. PILLSBURY,
Counsel for Petitioners.

PROOF OF SERVICE.

State of California,
City and County of San Francisco. } ss.

A. McGRATH, being first duly sworn, deposes and says:

That she is a clerk in the office of the Industrial Accident Commission of the State of California, one of the petitioners herein, and that the said petitioner and its counsel, Warren H. Pillsbury, have their office and place of business at 307 Underwood Building, San Francisco, California; that A. S. Halsted, Fred E. Pettit, Jr., and E. E. Bennett are three of the attorneys of record for the respondent herein, and that they have their office and place of business at 504 Pacific Electric Building, Los Angeles, California; that Britton & Gray are also attorneys for the respondent and have their office in the Wilkins Building, Washington, D. C.; that Charles H. Bates is also attorney for the respondent and has his office in the Mills Building, Washington, D. C.; that there are United States post offices in the city of San Francisco, the city of Los Angeles and the city of Washington, with regular daily communication by mail between said cities; that on the 11th day of March, 1922, affiant served the foregoing petitioners' reply brief upon said A. S. Halsted, Fred E. Pettit, Jr., and E. E. Bennett, by depositing on said date, in the United States post office at San Francisco, California, properly enclosed in a sealed

envelope, three true and correct copies of the said foregoing brief, all postage thereon being prepaid, the said envelope being addressed as follows: "Messrs. A. S. Halsted, Fred E. Pettit, Jr., and E. E. Bennett, 504 Pacific Electric Building, Los Angeles, California"; and on the same day affiant served the said brief upon said Britton & Gray by depositing on said date, in the United States post office at San Francisco, California, properly enclosed in a sealed envelope, a true and correct copy of said brief, all postage thereon being prepaid, the said envelope being addressed as follows: "Messrs. Britton & Gray, Wilkins Building, Washington, D. C."; and on the same day affiant served the said brief upon said Charles H. Bates by depositing on said date, in the United States post office at San Francisco, California, properly enclosed in a sealed envelope, a true and correct copy of said brief, all postage thereon being prepaid, the said envelope being addressed as follows: "Charles H. Bates, Mills Building, Washington, D. C."

A. McGRATH.

Subscribed and sworn to before me this 11th day of March, 1922.

H. L. WHITE,
Secretary Industrial Accident Commission
[SEAL] of the State of California.

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